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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 268

MISSOURI-KANSAS PIPE LINE COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, GEORGE H. HOWARD, PHILIP G. GOSSLER, CHARLES A. MUNROE, THOMAS R. WEYMOUTH, THOMAS B. GREGORY, EDWARD REYNOLDS, JR., BURT R. BAY and JOHN H. HILLMAN, JR.,
Appellees.

BRIEF OF APPELLEE COLUMBIA GAS & ELECTRIC CORPORATION

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BRIEF OF APPELLEE COLUMBIA GAS & ELECTRIC CORPORATION

NATURE OF THE PROCEEDING

This is an appeal from an order (R. 541-542) entered by the United States District Court for the District of Delaware on April 23, 1940, denying an application by appellant to intervene in a civil anti-trust suit brought by the United States Department of Justice against appellees.

The application was denied by the District Court without opinion. However, a previous application to intervene

by the same appellant, asking for the relief which is asked for in the instant application, had been denied by the same District Court about a year earlier, on March 29, 1939, with an opinion (R. 314; reported in 27 F. Supp. 116), and the appellant states in its Statement As to Jurisdiction (p. 3 thereof), referring to this opinion, that "petitioner believes it states the grounds upon which the Court acted in denying the instant application."

Jurisdiction of this Court is invoked by appellant under the Expediting Act of 1903 (Act Feb. 11, 1903, c. 544, 32 Stat. 823, as am.; 15 U. S. C. §§ 28 and 29).

QUESTIONS PRESENTED

The questions presented on this appeal are

(1) Whether the order sought to be appealed from is "final" so as to be appealable; and

(2) Whether, if the order is final and appealable, there is any error therein.

STATEMENT OF THE CASE

This cause was commenced by the United States Government on March 6, 1935, by a bill in equity filed in the United States District Court for the District of Delaware against Columbia Gas & Electric Corporation (hereinafter referred to as Columbia Gas), Columbia Oil & Gasoline Corporation (hereinafter referred to as Columbia Oil), and various individual defendants, to restrain an alleged violation of the Federal Anti-trust laws. The bill was amended by the Government by a later bill filed October 30, 1935 (R. 10). Briefly, the bill charged that Columbia Gas

and Columbia Oil, being the corporate defendants, and the several individual defendants, had been and were engaged in a conspiracy to stifle, in the interest of Columbia Gas and in order to prevent competition with Columbia Gas, the independent operation of a natural gas pipe line owned by a company known as the Panhandle Eastern Pipe Line Company (hereinafter referred to as the Panhandle Eastern) (R. 14), projected and partially constructed from the Texas natural gas fields to Indianapolis for the purpose of serving territory in Indiana and adjacent states (R. 13) where Columbia Gas, it was alleged, already had a practical monopoly of sales of natural gas (R. 13); the bill alleged that the Missouri-Kansas Pipe Line Company (the present petitioner, hereinafter sometimes referred to as Mokan or as appellant) owned a half interest in the stock and junior debt of Panhandle Eastern (R. 18, 20), and that the other half interest in the stock and junior debt was owned by Columbia Oil (R. 18, 20), the senior debt being also owned by Columbia Oil (R. 20); that Columbia Oil and Columbia Gas dominated the management of Panhandle Eastern (R. 19, 20) and stifled its sales of gas (R. 24) in order to enable them to acquire the ownership of its line by enforcing their claims as creditors (R. 27); that Panhandle was thus rendered insolvent (R. 24) and Mokan forced into receivership (R. 23). The bill also alleged that Columbia Gas owned all of the preferred stock of Columbia Oil (R. 12) and that the two Columbia Companies were co-conspirators in the alleged infraction of the anti-trust laws. The bill stated that these acts of Columbia Gas and Columbia Oil constituted a conspiracy in restraint of trade in interstate commerce (R. 14) and that it was necessary that Columbia Oil and Columbia Gas divest themselves of any interest in Pan-

handle Eastern in order to enable it to maintain itself in a position where it could freely compete with Columbia Gas (R. 30).

Columbia Gas (R. 109) and Columbia Oil (R. 119) each filed answers denying the allegations of the bill, as did also the individual defendants (R. 109, 119, 128, 132).

The case never came to trial because on January 29, 1936, a Consent Decree was entered (R. 142). The stipulation prefixed to this Decree, signed both by the Government and the defendants, contained the statement that the defendants maintained the truth of their answers filed in the cause and asserted that they had not violated the anti-trust laws but, in order to avoid the expense and disturbance attendant on litigation, were willing to enter into the Consent Decree provided this should not be taken as an admission of previous wrong-doing on their part (R. 138, 139). By the Decree the defendants were restrained (R. 144) from interfering with the independent action of Panhandle Eastern in the production, transportation or sale of gas. Columbia Oil was, however, expressly permitted to retain its stock in Panhandle Eastern (R. 145) and Columbia Gas was expressly permitted (R. 145) to retain its stock in Columbia Oil, although the requirement was made (R. 140) that this stock so held in Columbia Oil should not entitle Columbia Gas to elect more than a minority of the board of directors of Columbia Oil. The Decree required (R. 146) the holdings of Columbia Oil in Panhandle Eastern to be lodged with a Trustee named in the Decree, with power to vote the stock for purposes not inconsistent with the Decree and to elect as directors nominees recommended by the beneficial owner of the stock (Columbia Oil), of which the Trustee should be one, but with the power to remove

such directors and replace them with others of his own choosing if in his judgment such action were necessary in the interests of Panhandle Eastern or to effectuate the purposes of the Decree (R. 146-147). Columbia Oil has been, since the entry of the Decree, the owner of sufficient shares of Panhandle Eastern to be thus permitted to recommend to the Trustee for election six out of nine directors of Panhandle Eastern (R. 502). The Trustee named in the Decree, Mr. Gano Dunn, has continued in office since his appointment from the date of the Decree down to the present date and has voted the stock pursuant to the directions of the Decree; extracts from his semi-annual reports filed with the court in pursuance of the Decree are part of the record (R. 149-274). The Decree also provided that Panhandle Eastern, upon proper application, might become a party thereto for the limited purpose of invoking certain relief to protect it against infractions of the anti-trust laws (R. 149).

Almost three years after the entry of the Decree, on January 12, 1939, the Government filed a Supplemental Complaint (R. 274) asking a modification of the Decree to require, in the alternative, either (1) Columbia Gas to divest itself of its stock in Columbia Oil, or (2) Columbia Oil to divest itself of its stock in Panhandle Eastern (R. 281). After successive extensions of the time to answer, the corporate and the individual defendants filed answers, on May 15, 1939, in opposition to this Supplemental Complaint (R. 322, 326, 313).

In the meantime, on February 6, 1939, Mokan had filed its petition (R. 283) in the District Court to be allowed to intervene in the cause, alleging its interest in a large minority block of Panhandle Eastern common stock which

it held and asking intervention both in its own right and, as does the instant petition, in the right of Panhandle Eastern (R. 307, 308). It asked for very considerable changes in the Decree, including the change that Columbia Gas be required to hold a section of its own line, connecting the Panhandle Eastern line with Detroit, as trustee for the Panhandle Eastern; that the provisions of the Decree which permitted Columbia Oil to own stock of Panhandle Eastern be eliminated; and that Mr. Gano Dunn be removed as trustee (R. 310). The District Court on March 29, 1939, handed down an opinion rejecting this application of Mokan to be allowed to intervene (R. 314), holding that it was not entitled to intervene as a matter of right and should not be allowed to intervene as a matter of discretion. The opinion is reported in 27 Fed. Supp. 116.

The same day, May 15, 1939, on which the defendants answered denying the allegations of the Government's Supplemental Complaint, the Government asked leave to withdraw this Supplemental Complaint (R. 332) and to file an Amended and Supplemental Complaint (R. 333, 334), asking, in effect, to vacate the Consent Decree and to try the original anti-trust case as if there had never been any decree, but preserving the status set by the Consent Decree in the meantime (R. 333). Action on this second Supplemental Complaint has not been pressed by the Government, nor has permission been granted by the Court to file it.

On June 20, 1939, the defendant companies, Columbia Gas and Columbia Oil, in an endeavor to avoid further litigation with the Government, filed in the District Court on their own motion, and not as a responsive pleading to either the Government's Supplemental Complaint of January 12 or its proposed later Amended and Supplemental Complaint of May 15, a proposed Plan (R. 356, 396) providing for the

surrender by Columbia Gas to Columbia Oil of its entire holdings in the stock of Columbia Oil, in return for the transfer by Columbia Oil to Columbia Gas of certain oil and gasoline properties, thus complying in effect with the first of the alternatives (R. 281) contained in the prayer of the Government in the Supplemental Complaint which it had filed on January 12, 1939. The District Court on July 10 referred the consideration of this Plan to a Special Master by an order (R. 371) requiring him to proceed from day to day with the hearing and report to the court with all possible speed.

Shortly after the presentation of this Plan by the defendant companies, Mokan filed with the court on July 5, 1939, a new petition (R. 363) for leave to intervene in the cause, again stating its interest in the stock of Panhandle Eastern and again asking for a change in the existing Decree by requiring Columbia Oil to give up its holdings of Panhandle Eastern stock. The District Court denied this second petition for intervention without opinion by order dated July 10, 1939 (R. 371), stating that this denial was without prejudice to the right of Mokan to be heard as *amicus curiae* on questions of law and fact in regard to the fairness and effectiveness of the proposed Plan. The order of reference of the Plan to the Special Master also specifically required that Mokan be permitted by him to appear at his hearings as *amicus curiae* (R. 372).

Appeals (R. 6 and 410) were taken by Mokan from both orders of the District Court denying intervention to the Circuit Court of Appeals for the Third Circuit, where the appeals were consolidated. The Circuit Court of Appeals held in its opinion handed down December 15, 1939, that it had no jurisdiction of the appeals because of the provisions of the Expediting Act: *Missouri-Kansas Pipe Line Com-*

pany v. *United States et al.*, 108 F. (2d) 614. Certiorari was denied by this Court: *Missouri-Kansas Pipe Line Company* v. *United States et al.*, 309 U. S. 687.

Meanwhile, the Special Master appointed (R. 371) by the District Court on July 10th to hold a hearing and report to the court upon the voluntary Plan proposed by defendants Columbia Gas and Columbia Oil, filed on July 29, 1939, his report (R. 373-396) approving the Plan as appropriate to insure accomplishment of the purposes of the Consent Decree (R. 374, 394). Mokan filed numerous objections to the report of the Master (R. 404). The United States filed no exceptions to the report except to the failure of the Master to find that it was necessary that certain named individuals should dispose of their holdings of stock of Columbia Oil as a condition to putting the Plan into execution (R. 403).

On January 18, 1941, the District Court handed down its opinion confirming the report of the Master in approving the Plan. The Court's opinion is printed in full as Appendix A to this brief. The Court modified the Master's report to meet the exception of the Government above referred to, by requiring that certain individuals dispose of their holdings of Columbia Oil stock as a condition to putting the plan into execution.

On March 23, 1940, a third application to intervene in this cause was purported to be filed by Panhandle Eastern itself (R. 412). The attorneys purporting to represent Panhandle Eastern in such proceeding were the same as those representing Mokan in the instant proceeding; and the relief asked in it is substantially the same as that asked in the instant proceeding. Motions were made by Columbia Gas (R. 426) and Columbia Oil (R. 514) to dismiss

this third application on the ground that it was not properly authorized by Panhandle Eastern and that the attorneys who filed the application were not authorized by Panhandle Eastern to represent it. The District Court granted the motions upon these grounds. Its opinion (R. 520) is reported in 32 Fed. Supp. 474. An appeal from this order is pending in this Court as Case No. 269 of this term.

On April 16, 1940, a fourth, the instant, application (R. 526) was filed by Mokan to intervene in the cause, the application being filed as a stockholder of Panhandle Eastern on behalf of Mokan as such stockholder and all other stockholders similarly situated, to obtain relief for Panhandle Eastern. The court by order of April 23, 1940 (R. 541), denied the application without opinion. However, appellant in its Statement As to Jurisdiction, at page 3 thereof, states that it believes that the opinion of the court of March 29, 1939 (R. 314), denying the first petition to intervene "states the grounds upon which the Court acted in denying the instant application".

Appellant now appeals to this Court from said order of April 23, 1940, denying this fourth application to intervene in this cause.

SUMMARY OF ARGUMENT

POINT I—The application to intervene was defective because, being filed only as a stockholders' bill on behalf of Panhandle Eastern, it did not join Panhandle Eastern as a party. It was therefore correctly denied, and the present appeal should be dismissed, because of failure to join an indispensable party.

POINT II—The order herein sought to be appealed was not final, but interlocutory, and is therefore not appealable.

The petition does not come within the provisions of Rule 24(a) of the Rules of Civil Procedure, governing intervention as of right.

Sections IV and V of the Consent Decree do not give the appellant the right to intervene for the purposes set out in the application.

POINT III—The decision of the District Court denying the petition to intervene was correct.

A. The attempt to intervene was not timely.

B. An individual may not participate in a suit brought under the anti-trust laws by the Attorney General of the United States.

C. Intervention will not be permitted where intervenor seeks to introduce into an action entirely new issues. Specifically, it is well settled that issues of alleged unjust enrichment or private damages may not be introduced into an anti-trust suit brought by the United States Government.

D. It is a settled rule of practice that intervention will not be permitted after entry of the decree, for the purpose of attacking or modifying the same.

POINT IV—The appellant's application was properly denied for the further reason that the order denying its first petition to intervene was conclusive against permitting intervention on the instant petition, inasmuch as this alleges no new facts of substance.

ARGUMENT

POINT I

THE APPLICATION TO INTERVENE WAS DEFECTIVE BECAUSE, BEING FILED ONLY AS A STOCKHOLDERS' BILL ON BEHALF OF PANHANDLE EASTERN, IT DID NOT JOIN PANHANDLE EASTERN AS A PARTY. IT WAS THEREFORE CORRECTLY DENIED, AND THE PRESENT APPEAL SHOULD BE DISMISSED, BECAUSE OF FAILURE TO JOIN AN INDISPENSABLE PARTY.

At the outset of the consideration of this appeal, it is appropriate to call the attention of the Court to a defect in the application to intervene consisting in the failure of the appellant to join an indispensable party, to wit, Panhandle Eastern.

The petition was brought by the appellant solely as a stockholder of Panhandle Eastern and in behalf of that Company to obtain relief to which appellant considered that Panhandle Eastern was entitled (R. 526). It alleges demand made by appellant on Panhandle Eastern to apply for this relief but refusal on the part of Panhandle Eastern to take the action demanded due to alleged domination of Panhandle Eastern by Columbia Oil, one of the appellees herein (R. 538). However, Panhandle Eastern is not joined as a party.

The failure to join Panhandle Eastern as a party is a bar to any proceeding on this application, because Panhandle Eastern was an indispensable party.

In a suit, which a minority stockholder brings on behalf of the corporation, alleging prior demand on the corpora-

tion and refusal of the corporation to act, it is well settled that the corporation is an indispensable party. It is probably superfluous to cite authorities for such an established principle, but, from a multitude of those available, we may cite *Davenport* v. *Dows*, 18 Wall. 626 (1873), where this Court stated the rule as follows (at p. 627):

> "That a stockholder may bring a suit when a corporation refuses is settled in *Dodge* v. *Woolsey* [18 Howard, 340], but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."

And this Court has stated, in another case involving a minority stockholders suit (*Venner* v. *Great Northern Railway*, 209 U. S. 24, 32 (1908)), that an argument that it is not necessary to join the corporation because the relief prayed for appears on the face of the complaint to be to its

advantage, is of no validity since both the corporation and the defendant against whom actual relief is asked

> "are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, * * *"

Hughes, Federal Practice, Vol. 2 § 741 states the rule as follows:

> "But, if a stockholder sues in his own name upon a right of action in the corporation, the latter is an indispensable party."

And to the same effect are other text writers: *Pomeroy on Equity Jurisprudence,* sec. 1095; *Fletcher on Corporations,* Vol. 13, sec. 5997.

In the instant case, inasmuch as the petition is stated to be brought only in the right of Panhandle Eastern, it is consequently fatally defective because of the failure to join the Panhandle Eastern as a party defendant. It might well be that Panhandle Eastern would object to the granting of this intervention application; at any rate its counsel should have a right to be heard on the matter. But inasmuch as it has not been joined as a party it has not this right. Furthermore the appellees herein should be entitled to a judgment which will protect them from further actions of the same sort by other stockholders of Panhandle Eastern, but unless Panhandle Eastern is joined the appellees could be subjected to successive derivative suits brought by other Panhandle Eastern stockholders.

Consequently, for failure to join an indispensable party, if for no other reason, the petition was rightly denied and this appeal should be dismissed.

POINT II

THE ORDER HEREIN SOUGHT TO BE APPEALED WAS NOT FINAL, BUT INTERLOCUTORY, AND IS THEREFORE NOT APPEALABLE.

The general rule is that an order denying intervention is not a final order and hence not appealable except in a limited class of cases where an absolute right to intervene exists. This rule was stated in *United States* v. *California Cooperative Canneries,* 279 U. S. 553 (1929), at p. 556, in connection with an appeal from an order denying to a private party leave to intervene in an equity anti-trust suit brought by the United States Government:

> "The Supreme Court [of the District of Columbia] denied leave to intervene. The Canneries appealed to the Court of Appeals. That Court, so far as appears, did not consider the question whether, in view of the Expediting Act [15 USCA §§ 28, 29] it had jurisdiction on appeal. It did not refer to the decisions which hold that an order denying leave to intervene is not appealable, *In re Cutting,* 94 U. S. 15; *Credits Commutation Co.* v. *United States,* 177 U. S. 311; *Ex Parte Leaf Tobacco Board of Trade,* 222 U. S. 578, 581; *In re Engelhard,* 231 U. S. 646; *City of New York* v. *Consolidated Gas Co.,* 253 U. S. 219; *New York* v. *New York Telephone Co.,* 261 U. S. 312, except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit; compare *French* v. *Gapen,* 105 U. S. 509, 524-526; *Smith* v. *Gale,* 144 U. S. 509; *Leary* v. *United States,* 224 U. S. 567; *Swift* v. *Black Panther Oil & Gas Co.,* 244 Fed. 20, 30."

The same statement was made by this Court in another Government equity anti-trust suit brought to dissolve the tobacco monopoly, where an application to intervene by the sellers of leaf tobacco had been denied by the District Court: *Ex parte Leaf Tobacco Board of Trade,* 222 U. S. 578 (1911), where it was stated at page 581:

> "The action of the court below in refusing to permit the movers to become parties to the record is not susceptible of being reviewed by this court on appeal, or indirectly, under the circumstances here disclosed, by the writ of mandamus."

The same general rule applies in all suits. In *Credits Commutation Co.* v. *United States,* 177 U. S. 311 (1900), where this Court affirmed a decision of the Circuit Court of Appeals which had refused to entertain appeals from an order of the Circuit Court denying the petitions of appellants for leave to intervene, it quoted with approval the language of the Court below as follows (pp. 315-6):

> " 'When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. * * * It is doubtless true

> that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claims by denying him all right to relief. The cases at bar, however, are not of that character.' "

That the petition to intervene is filed on behalf of a corporation by a minority stockholder does not vary the rule; it was so decided by this Court in a foreclosure proceeding against a corporation, where the minority stockholder petitioning to intervene to contest the foreclosure alleged a contrary interest in the board of directors and where this Court held that the refusal of the petition was not appealable; *Ex parte Cutting,* 94 U. S. 14, 22 (1876).

The same general rule has been enunciated with unanimity by the Circuit Courts of Appeals. See for instance the words of the Circuit Court of Appeals for the Third Circuit, in *Kennedy* v. *Bethlehem Steel Co.,* 102 F. (2d) 141, 142 (C. C. A. 3rd, 1939):

> "It is settled that an order refusing leave to intervene in a civil action is interlocutory. Not only is it a discretionary order but it leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding."

and the words of the Circuit Court of Appeals for the Tenth Circuit in *Demulso Corporation* v. *Tretolite Co.*, 74 F. (2d) 805, 807 (1934):

> "Petitions of third parties to intervene in pending litigation are generally within the discretion of the trial court, and orders denying the same are not final nor appealable, unless the petitioner has a direct interest in the subject of the suit which may be asserted or protected only by intervention in the pending suit; in that event, his right to intervene is absolute;"

and the words of the Circuit Court of Appeals for the Fifth Circuit in *Burrow* v. *Citizens' State Bank*, 74 F. (2d) 929, 930 (1935):

> "Except in the single instance of the administration in court of a fund in which interveners claim a share, *Bankers' Trust Co.* v. *Virginia Ry. & Power Co.* (C. C. A.) 273 F. 999; *Swift* v. *Black Panther Oil & Gas Co.* (C. C. A.) 244 F. 20, 30, an order denying leave to intervene is a discretionary order. It is not a final order from which an appeal will lie."

The new Rules of Civil Procedure have not changed this rule; see Moore's "Federal Practice under the New Federal Rules" (1938), Vol. 2, page 2332:

> "The main practical difference between absolute and discretionary rights of intervention is that only in the absolute type, will an appeal lie from the order refusing intervention."

Furthermore, if the order appealed from is not final then, in addition to the general rule that it is not appealable

established by the foregoing authorities, the Expediting Act (15 U. S. C. §§ 28, 29) itself prevents an appeal therefrom to any court; see the words of this Court in *U. S.* v. *California Cooperative Canneries Company*, 279 U. S. 553 (1929), at 558, to the effect that the Expediting Act "precluded the possibility of an appeal to either court" (*i. e.*, the United States Supreme Court or the Circuit Court of Appeals), "from an interlocutory decree."

To avoid the rule established by the foregoing authorities, appellant has argued that it was entitled to intervention as of right so as to establish its right to appeal. However, it is clear that appellant had no claim to intervention as of right, and we will now discuss the authorities bearing on this question.

The petition does not come within the provisions of Rule 24(a) of the Rules of Civil Procedure, governing intervention as of right.

The new Rules of Civil Procedure for the District Courts of the United States enumerate in Rule 24 thereof the situations where intervention may be allowed. The enumeration is exclusive and appellant must bring itself within this Rule. The Rule provides for two kinds of intervention: (a) Intervention as of right, and (b) Permissive intervention. In view of the authorities just cited, only the provisions of the Rule applicable to interventions as of right need be considered.

The Rule provides as follows:

> "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States

> confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

Appellant cannot bring its petition within the provisions of the above rule.

In the first place, the petition is not "timely". This question will be discussed *infra*, pages 34 to 39.

Secondly, it cannot be brought under the three cases enumerated by the rule. These cases are as follows:

> 1. "When a statute of the United States confers an unconditional right to intervene."

This obviously has no application to the petition. There is no such statute involved here.

> 2. "When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

To the extent that appellant seeks to intervene as a member of the general public for the purpose of seeing that the anti-trust laws of the United States are properly enforced and that the Consent Decree is accomplishing the purpose for which it was entered or that it is amended in a proper manner, appellant's interest is adequately represented by the Attorney General who filed a Supplemental Complaint for that purpose (R. 274, 280) and at a later date a motion

to be allowed to vacate the Consent Decree and try the case (R. 333). Surely it cannot be seriously contended by appellant that the Anti-trust Division of the Department of Justice, which has conducted this suit from its inception in 1935 and is vigorously prosecuting it, is not now competent to handle the questions raised by its Supplemental Petition and motion to vacate. The appellant can therefore not bring itself within the language of the rule covering the case "where the representation of applicant's interest by existing parties is or may be inadequate."

To the extent that appellant seeks to intervene to assert or protect rights which are peculiar to it, apart from rights affecting the general public, then, of course, appellant would not "be bound by a judgment in the action" because the assertion of the peculiar rights of appellant would raise issues not now before the Court. The appellant can therefore also not bring itself within the further language of the rule requiring that the intervenor "is or may be bound by a judgment in the action." This was also the view of the District Court in its opinion denying the first of appellant's applications to intervene in this proceeding, which opinion was filed March 29, 1939 (R. 314) and which the appellant in its Statement As to Jurisdiction (p. 3 thereof) says that it believes states the grounds upon which the court acted in denying the instant application, and wherein the court said:

> "Outside this suit Mokan can assert any claim for damages it may have against the defendants or for relief against Dunn for his alleged breaches of trust."

For a recent decision under the new Rules supporting this conclusion we may cite *Palm.* v. *Guaranty Trust Co.*

of New York, 111 F. (2d) 115 (C. C. A. 2nd, 1940), wherein the court affirmed an order below denying a petition to intervene in a mortgage foreclosure action, the petitioners claiming that they were entitled to intervene in order to set up a lien, in the form of rent reserved, upon the mortgaged assets, prior to the lien of the mortgage. The Court, referring to the fact that the petitioners would not be bound by any judgment in the action, inasmuch as even if their claim were valid, a sale under foreclosure would not affect it because the judgment would preserve all prior liens upon the mortgaged property, said at page 116:

> "The case does not fall within Rule 24 (a), Rules of Civil Procedure for District Courts, 28 U. S. C. A. following section 723c, as the petitioners suppose. Concededly no statute gives them an 'unconditional right to intervene', so that subdivision one is eliminated; and subdivision two is equally inapplicable, for they will not be 'bound by a judgment in the action'. Even though their claim should prove valid, the sale has not affected it, for the judgment preserves all prior liens and subjects the buyer's title to them."

In addition, since this subdivision (2) of Rule 24(a) is similar to the equity practice existing prior to the adoption of the Federal Rules, we may also cite as authority the earlier decision of the Circuit Court of Appeals for the Fourth Circuit in *Radford Iron Co. v. Appalachian Electric Power Co.,* 62 F. (2d) 940 (1933) (cert. den. 289 U. S. 748), where the Power Company had brought a proceeding against the Federal Power Commission to set aside the order of the Commission denying to the Power Company permission to construct a dam on the New River. Thereupon the Iron Company petitioned to

intervene, declaring that it was the owner of valuable mineral and timber lands on waters tributary to the New River, and that the construction of the dam would interfere with its right theretofore exercised to transport the ore and lumber from its lands over the waters affected by the dam. Intervention was denied, the court saying, at page 943:

> "There can be no doubt, in view of the decision of *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, 50 S. Ct. 140, 74 L. Ed. 483, that the legal rights of the iron company will not be prejudiced or foreclosed by any decision in the pending suit to which it is not a party. * * * In short, if the iron company's right is one which might be made the subject of an independent suit, it will not be lost by any action of the court in this case. If, on the other hand, it is of a general character, held in common with the general public, it falls within the class which the Federal Power Commission is clothed with the power and the duty to protect. In either aspect, the appellant is not entitled as of right to intervene in this case."

The words of the Circuit Court of Appeals in the foregoing case may be applied almost verbatim to show that appellant has no right of intervention under clause (2) of Rule 24(a).

> 3. "When the applicant is so situated as to be adversely affected by distribution or other disposition of property in the custody of the court or of an officer thereof."

In the first place, it seems clear, as held by the District Court in its opinion denying the first intervention petition (R. 319), that the shares of Panhandle Eastern stock

owned by Columbia Oil and in the possession of Gano Dunn, the Trustee appointed by the Court under the Consent Decree, are not "in the custody of the court or of an officer thereof" within the contemplation of Rule 24, because Mr. Dunn's duties as a trustee are merely to see that the provisions of the Consent Decree are carried out and to report thereon to this Court. His holding of the stock is only for the purpose of assurance that Columbia Oil, as its owner, is not using its ownership to the detriment of Panhandle Eastern by thwarting the purposes of the Decree. He has no property right in it. By Article III of the Consent Decree (R. 147) he is required to pass on to Columbia Oil all cash dividends received on the stock and to vote the stock as requested by such beneficial owner, provided the purposes and requirements of the Consent Decree are observed.

But quite apart from the question whether Mr. Dunn's holding of the shares of Panhandle Eastern stock as a watchman or a guardian constitutes such shares "property in the custody of the court or of an officer thereof" as required by this provision of Rule 24, it is perfectly clear that appellant will not "be adversely affected by distribution or other disposition of" the property (to quote the requirement of the Rule), because appellant has no property interest in or lien on the stock. The language of Rule 24 contemplates the necessity of the existence in the intervener of some property right in the *res* which is in the custody of the court and which the court is going to dispose of. This rule is a restatement of the long established doctrine of intervention *pro interesso suo,* which by a long line of authorities requires a property right to make it applicable; see Moore's "Federal Practice under the New Federal Rules"

(1938) Vol. 2, pages 2339, 2344 and 2345, commenting on this Rule, where the text reads as follows:

> "What kind of an interest must a petitioner have in property subject to the control of a court before he can claim an absolute right to intervene? Obviously it must be an interest known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal.
>
> * * * * * * * *
>
> "When a creditor brings an individual action against a debtor, another creditor will not have an absolute right to intervene. To hold otherwise would be to abandon completely the general notion that a plaintiff may control his action and that an unrepresented petitioner must show a lien interest to support an absolute right of intervention. * * *
> "Where a legal interest in property is lacking, there can be no lien, and hence no absolute right to intervene."

Neither Mokan nor Panhandle Eastern claims any property right in the Panhandle Eastern stock held by Mr. Dunn; this belongs to Columbia Oil and to no one else. Appellant asserts that it is interested in seeing that the Panhandle Eastern stock so owned by Columbia Oil shall be disposed of in various ways, as by the surrender of 80,000 shares for non-voting stock and the cancelation of the voting rights on the Preferred. This, however, is an entirely different thing from a claim to a property right in the stock. No such claim is here made, and such claim must be made in order to bring the petition within the above-cited Rule governing intervention of right. Enforcement of the anti-trust laws is one thing and is a governmental func-

tion, or, if a private party has been injured by an infraction of the anti-trust law, he may have his action for damages in an independent damage suit; but protection of property rights or liens in a specific *res* in the custody of the court is quite another thing and it is to this that subdivision (3) of the part of Rule 24 on intervention of right is addressed. The appellant in this case makes no claim and could make no claim to such a property right or lien.

In support of our conclusion we may cite the recent decision of the United States District Court for the Eastern District of Kentucky, coming up under the new Federal Rules, in the case of *Babcock* v. *Town of Erlanger,* 34 F. Supp. 293 (1940), wherein the court denied a petition by a contractor to intervene in a suit for rescission brought by a purchaser of municipal water works bonds against the municipality, the basis for the suit being misrepresentation and the relief asked including a claim for recovery of moneys already advanced by the purchaser of the bonds. The contractor sought to intervene to ask judgment against the complainant, the purchaser of the bonds, for money expended by him in partial construction of the water works before the complainant announced its refusal to carry out the contract of purchase. The court said in comment on subdivision (3) of Rule 24(a), at page 295:

> "This rule amplifies and restates both at law and in equity the federal practice at the time of its adoption. Washington Institute on Federal Rules, page 67.
>
> "The cases prior to the adoption of the rule are therefore in point on this question. *Radford Iron Co.* v. *Appalachian Electric Power Co.,* 4 Cir., 62 F. (2d) 940; *United States* v. *Houde Engineering Corporation,* D. C., 9 F. Supp. 836, 839.

"I am of the opinion that the proposed pleadings accompanying the motions to intervene do not meet the requirement. * * *

"The position of the interveners is untenable. There is no res in court in which they have an interest. There is no right which they have which would be denied them by a judgment of this court whether in favor of the complainant or defendant. The fund sought to be recovered by the complainant is certainly not a fund in court over which there is litigation within the meaning or contemplation of the rule."

That this reasoning correctly sets forth the meaning of subdivision (3) of Rule 24(a) can not be doubted. It is almost inconceivable that Rule 24 could have been intended, without some affirmative statement to that effect, to change the well-settled principles as to when an intervention may be allowed, so that the intervener be not "adversely affected by distribution or other disposition of property in the custody of the court or of an officer thereof." The purpose of the new rule on intervention is stated by Dean Clark, Reporter to Supreme Court Advisory Committee on the new Rules, found in the recent publication of the American Bar Association entitled "Federal Rules of Civil Procedure; Proceedings of Institute; Washington and New York, 1938", at page 67, where discussing Rule 24 he says: "Intervention is another case where, by stating the rule more in detail, we have tried to cover the existing law without very substantial change, but more by way of clarification." And under the "existing law", that is, the law as it existed prior to the adoption of the new Rules, it is perfectly clear that there would be no intervention as of right in a case such as the present.

Thus this Court in *Smith* v. *Gale,* 144 U. S. 509 (1892), had before it for interpretation the general language of the Dakota Code of Civil Procedure, which stated that "Any person may, before a trial, intervene in any action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both. * * *" But notwithstanding the general scope of this language, this Court held that it must be construed in the light of existing authorities limiting intervention to cases where a property right was claimed in the subject of the litigation, quoting with approval the following at page 518:

> "'* * * To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some part thereof in suit, or lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of the litigation.'"

Similarly, we again refer to the decision of the Circuit Court of Appeals for the Fourth Circuit, cited and digested on page 22 above, in *Radford Iron Co.* v. *Appalachian Electric Power Co.,* 62 F. (2d) 940 (1933) (cert. den. 289 U. S. 748) where the court said at page 943:

> "Even if it should be supposed that the petition for intervention makes out a case of apprehended special damage on the part of the iron company, which would support an independent suit on its part against the power company to secure an injunction to prevent the obstruction of the stream, it does not follow that the iron company would be entitled to intervene in the present suit. * * * It is only when he who seeks to intervene has a direct and immediate interest in a *res,* the subject of the suit, and cannot

otherwise protect his interest, that the right of intervention is absolute, and a denial is the subject of an appeal. *United States* v. *California Canneries*, 279 U. S. 553, 556, 49 S. Ct. 423, 73 L. Ed. 838;"

Attention may also be directed to a recent decision of the Circuit Court of Appeals for the Fifth Circuit: *San Antonio Utilities League* v. *Southwestern Bell Telephone Co.*, 86 F. (2d) 584 (1936) (cert. den. 301 U. S. 682), a case in many respects comparable to the instant case since there had been a consent decree settling the rate controversy between the City of San Antonio and the public utility, which had ordered refunds of collected funds (to secure the refunding of which a bond had been required of the utility by the court) to consumers on a certain basis, and where the petitioner for intervention sought to intervene to question the sufficiency of the refund. The District Court denied the intervention and, on appeal, the appeal was dismissed, the Circuit Court of Appeals saying, at page 585:

"To the thoroughly settled rule that an order denying leave to intervene is not appealable, *In re Cutting*, 94 U. S. 14, 15, 24 L. Ed. 49; *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 20 S. Ct. 636, 44 L. Ed. 782, there is only one substantial exception, that he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit (*citing authorities*). That, generally speaking, individual subscribers have no direct and immediate interest in a rate controversy and suit sufficient to authorize them to maintain or prosecute it, and that the matters involved in such a suit are matters entirely between the parties to it, the Utilities and the City, is settled by the authorities first

above cited. * * * Nothing in appellants' motion takes this case out of the general rule, that the allowance or refusal of a petition to intervene is discretionary, and not a final order from which an appeal will lie."

Sections IV and V of the Consent Decree do not give the appellant the right to intervene for the purposes set out in the application.

The appellant has no greater claim of right to intervene in the right of Panhandle Eastern if reference is made to Sections IV and V of the Consent Decree, on which the brief of appellant in this Court seems mainly to rely. Panhandle Eastern is not a party to the Decree and consequently has no contractual right under these Sections to intervene. The Sections merely constitute a consent by the real parties to the cause that, in the discretion of the Court, Panhandle Eastern may be made a party for certain purposes. And even if this were not a sufficient answer to appellant's argument, these Sections would not support the intervention application in the instant case because they are not directed to such an application. This will appear from a consideration of their terms.

Section V of the Consent Decree provides as follows:

"That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this decree and for the enforcement of strict compliance herewith and the punishment of evasions hereof, and for the further purpose of making such other and further orders and decrees or taking such other action as may from time to time be necessary to the carrying out hereof; and that Panhandle Eastern, upon proper application, may be-

come a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof."

The rights conferred upon Panhandle Eastern by Section IV of the Consent Decree so referred to are, quoting therefrom:

> "* * * in the event that Columbia Gas shall, with respect to any contract or any contractual rights of any kind whatsoever or any property held as security or used in connection with any contract, in any way prevent the free transportation, sale, and distribution of gas by Panhandle Eastern, then upon application to this Court or any court of competent jurisdiction Panhandle Eastern shall have the right (1) to the immediate appointment of a trustee to hold such contract rights or property subject to the purposes and provisions of this decree; (2) to immediate specific performance of any and all contracts with Columbia Gas; and (3) to immediate injunction, both temporary and final, as well as any other appropriate remedy at law or in equity, including any remedy hereunder."

The "limited purpose" of such intervention would be, accordingly, only for the purpose of preventing any such property or contract owned by Columbia Gas from being so used by it as to interfere with the free transportation, sale and distribution of gas by Panhandle Eastern in restraint of trade. Specifically, these above-quoted provisions of the Decree are claimed by the appellant to be applicable to the so-called Detroit extension, being the portion of the pipe line owned not by Panhandle Eastern but by Columbia Gas (through its subsidiary Michigan Gas Transmission Corporation) extending from the terminus of the Panhandle Eastern's line at the Illinois-Indiana State line to Detroit,

over which extension the gas must pass to Detroit which originates in Texas and passes through the pipe line of the Panhandle Eastern. If Panhandle Eastern could establish that this extension of the line was being used to prevent the free flow of gas in restraint of interstate commerce, it could, under these Sections IV and V of the Decree, address a petition to the discretion of the Court to be made a party to the cause for the "limited purpose" of preventing such interference with gas operations, and the Court could grant it or refuse such petition in its discretion. But of such "limited purpose" there is not a word in the prayers of the instant application. Its prayers are devoted instead to an endeavor to permanently enrich Panhandle Eastern through a transfer of private property rights, by the prayer that the stock of the Michigan Gas Transmission Corporation, the owner of the Detroit Extension, be turned over to a trustee for Panhandle Eastern to be held as its permanent, private property, subject to a lien in favor of Columbia Gas equal to the cost of constructing the Extension after a money accounting from Columbia Gas in Panhandle Eastern's favor for past profits (R. 539, par. 2); and an endeavor to enrich Mokan in its own right by depriving stock of Panhandle Eastern owned by Columbia Oil of voting rights and thereby increasing the proportionate voting rights of the stock owned by Mokan (R. 539, pars. 3 and 4). There is not a word in the prayers of the petition asking for any specific relief other than these prayers for private enrichment.

Even for such "limited purpose", the above-quoted provision of Section V of the Decree that Panhandle *"upon proper application,* may become a party hereto" shows that Panhandle Eastern's limited right to intervene is not an

absolute one, but is subject to the discretion of the District Court. Panhandle Eastern is not a party to the Consent Decree and cannot rely on any contractual right thereunder to intervene. The effect of the above-quoted provision from Section V that it may "on proper application become a party hereto" is not to give it a vested right but merely to prevent the real parties to the cause from raising the objection, which they could otherwise make, to the injection of a new party into the cause, in case the Court in its discretion should decide to add Panhandle Eastern as a party. Otherwise Panhandle Eastern could delay for many years, as has appellant in this proceeding, permitting appellees to expend large sums of money in reliance upon contracts and arrangements filed with the Court and known to both appellant and to Panhandle Eastern (see pp. 34-36 of this brief below citing the respective pages of the Record) and then claim the right to intervene, as appellant here attempts to do, for the purpose of trying to upset such contracts and arrangements.

It is therefore plain that the petition did not state a claim of intervention as of right so as to bring it within the requirements of any of the three subdivisions of Rule 24(a) of the Rules of Civil Procedure, and that there is likewise no right of intervention conferred by the Consent Decree, and that therefore the order denying the petition was not an appealable order.

We will next discuss under Point III the lack of timeliness in the petition, for, if it was not "timely", it for that reason also did not meet the requirements of law.

POINT III

THE DECISION OF THE DISTRICT COURT DENYING THE PETITION TO INTERVENE WAS CORRECT.

We have devoted the foregoing Point II of this brief to showing that, irrespective of the merits of the decision of the District Court in denying the petition for intervention, the decision is not appealable because the denial was not of a petition for intervention founded on right.

We will now briefly adduce reasons why, in any case, the decision of the District Court in denying the petition to intervene was correct. These reasons will be stated in order as follows:

A. The attempt to intervene was not timely.

The Federal Rule governing interventions (Rule 24), whether as of right (clause a) or permissive (clause b), begins with the requirement that it shall be "upon timely application." This requirement of timeliness is not met in the instant case.

Analysis of the petition shows that all of the specific acts complained of by appellant took place nearly three years prior to the filing of the first petition of appellant to intervene filed on February 6, 1939 (R. 283), and nearly four years prior to the filing of the present petition.

The acts complained of by appellant are:

(1) The acquisition by Columbia Gas of the right to construct the so-called Detroit extension, being the pipe line extending from the terminus of the Panhandle Eastern's pipe line at the Illinois-Indiana boundary to the City of Detroit. This acquisition, as stated in the

petition (par. XIII thereof; R. 531), took place on January 31, 1936, by contract with Panhandle Eastern dated that day. This acquisition and contract was approved under date of February 28, 1936, by Gano Dunn, Trustee, as shown by his report filed in the District Court (R. 161).

(2) The construction and ownership by Columbia Gas of this Detroit extension (Petition, par. XIV; R. 531). This construction (R. 540 D) was completed pursuant to the contract just mentioned, at the cost of several millions of dollars to Columbia Gas (R. 253), before the end of 1936 (R. 155). The operation of this Detroit extension was provided for in a contract between Michigan Gas Transmission Corporation (the subsidiary of Columbia Gas owning the extension) and Panhandle Eastern dated March 17, 1936 (R. 162); and this contract was approved under the same date by Gano Dunn, Trustee, as shown by his report filed in the District Court (R. 219).

(3) The acquisition by Columbia Oil after the entry of the Consent Decree of 80,000 additional shares of Panhandle Eastern Common Stock, to put Panhandle Eastern in funds to reinforce its pipe line to enable it to carry out its contract with Detroit (Petition, par XV; R. 532). This acquisition took place on April 1, 1936 (R. 220). The acquisition was approved by Gano Dunn, Trustee, under date of February 28, 1936, as shown by his report filed in the District Court (R. 268).

(4) The acquisition by Columbia Oil of the Class A and Class B Preferred of Panhandle Eastern (Petition, par. XVIII; R. 535). This acquisition took place

pursuant to contract between Columbia Gas, Columbia Oil and Mokan (represented by its receivers) dated June 1, 1936 (R. 224) and had been agreed to as early as April 22, 1936 (R. 269-274). This contract was an Exhibit (R. 219) to the report of Gano Dunn, Trustee, filed in the District Court for the six months period ended July 29, 1936.

(5) The making of the contract of March 17, 1936, between Panhandle Eastern and Michigan Gas Transmission Corporation providing for the operation by the latter of the Detroit extension (Petition, pars. XX and XXI; R. 535-538). This contract was approved under the same date by Gano Dunn, Trustee, as shown by his report filed in the District Court (R. 219).

All of these matters were of public record and known to appellant at the time of their occurrence, being elaborated in detail in the semi-annual reports of Gano Dunn, Trustee, above referred to, filed in the District Court. They were all approved by Mr. Dunn, as Trustee under the Consent Decree, as shown by the pages of the Record above cited.

They were furthermore all specifically approved by Mokan (acting through its receivers) as a part of the settlement of the civil money damage suit brought by Mokan against Columbia Gas and Columbia Oil which was settled by order of the Delaware Chancery Court in April, 1936, the order of the Chancellor (R. 245) expressly authorizing the acceptance of the settlement offer of Columbia Gas and Columbia Oil which had stated each one of the above five acts as a matter agreed to on which the settlement was to be based (R. 249-267 and 269), and Mokan (represented by its receivers) accepting the offer (R. 244).

In reliance upon these enumerated arrangements and contracts which are now complained of, but concerning which there was not only no complaint at the time they were made but instead actual acquiescence by appellant in their making, appellees have expended many millions of dollars in the acquisition of the shares of stock of Panhandle Eastern and in the construction of the pipe line facilities of the Michigan Gas Transmission Corporation (R. 318). Nearly three years later, appellant filed its first petition (R. 283) on February 6, 1939, wherein, without alleging any reason for the delay, appellant attempted to intervene for the purpose of attacking these very arrangements and contracts and for the purpose of demanding relief which would nullify them. This first petition having been denied, now, nearly four years later than the latest of these acts complained of, the appellant files the instant petition, for the purpose of attacking the same acts and demanding no relief that was not comprised within the prayers of the first petition. It is obvious that in these circumstances the appellant under established rules of equity is guilty of laches. The principle of laches is carried into Rule 24 governing intervention in the United States District Courts, for both subdivisions of this rule require that an application to intervene shall be "timely", in addition to all of the other requirements therein set forth.

For a case so involving timeliness arising under the new Rules we may refer to *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 112 F. (2d) 669 (C. C. A. 2nd, 1940), where the court dismissed an application by a bondholder to intervene in a receivership proceeding and in a related foreclosure action for the purpose of contesting the validity of certain bonds of the insolvent

corporation. The application to intervene was filed on September 27, 1939, claiming the right to intervene under both subdivisions of Rule 24. The receivership had commenced in 1932 and the foreclosure proceeding in 1935. The Circuit Court of Appeals said (p. 670):

> "The receivership litigation has been going on since 1932 and the foreclosure action was commenced in 1935. The appellant has taken an active part in court hearings and has been familiar with the situation for years. His application to intervene in September, 1939, can scarcely be deemed timely unless the asserted incompetence or faithlessness of parties representing his interests were recently discovered. This is not the case. He asserted their incompetence and faithlessness at least as early as July 1938 in respect to the very issue he now wishes to raise, namely, the invalidity of the pledged bonds. Instead of acting promptly, he postponed intervention until a plan for settlement of the Interborough's affairs had been drawn up on the assumption that no party to the proceedings was attacking the validity of the pledged bonds. Under these circumcumstances his application to intervene was not timely and his rights under Rule 24(a), if any he had, have lapsed."

Here the situation is similar. The appellant has been familiar with the situation since 1936. Appellant does not even attempt to claim that the acts of which it complains were not known then, at the time of their occurrence, nor could it. In dismissing the first application to intervene the District Court said (R. 318):

> "The new rule above quoted requires that application for intervention be timely. It begins with the

> words 'Upon timely application * * *.' The matters of which petitioner complains,—the acquisition by Columbia Gas of ownership of the Detroit extension, the acquisition by Columbia Oil of class B preferred stock of Panhandle Eastern, the acquisition by Columbia Oil of common stock of Panhandle Eastern in connection with the Detroit financing, and the March 17, 1936 contract,—all took place before June 1, 1936. Columbia Gas and Columbia Oil have spent many millions of dollars carrying out the transactions. Petitioner had full notice and knowledge of all these arrangements prior to their consummation. These details were set out in the offer of settlement made by Columbia Oil and Columbia Gas to Mokan and were accepted by Mokan after full hearing thereon in the court of Chancery of the State of Delaware. Obviously Mokan's application is not a timely one."

If that was true, as it was true, as applied to the first application to intervene, filed almost three years after the occurrence of the acts complained of, it is *a fortiori* true as to the instant application, attacking the same acts, filed almost four years after their occurrence. The present application of the appellant is therefore anything but timely, and was correctly dismissed for that reason alone.

B. An individual may not participate in a suit brought under the anti-trust laws by the Attorney General of the United States.

The sole issue on which the Consent Decree was entered was the issue of the alleged violation of the anti-trust laws. The Department of Justice is the agency, and the only agency, charged with the duty of enforcing the federal anti-

trust laws. A private litigant cannot usurp the duties of the Government as the conservator of the public welfare nor intrude upon the Attorney General when he is enforcing such rights. The petition in the instant case seeks to entitle the appellant to such intrusion.

The impropriety of allowing such intrusion on the part of a private party in a proceeding instituted by the Government under the anti-trust laws has been forcibly brought out in two Federal decisions, the *Northern Securities* case and the *Buckeye Coal-Hocking Valley* case.

In *U. S.* v. *Northern Securiites Co.,* 128 Fed. 808 (C. C. S. D. Minn. 1904), the United States had brought suit against Northern Securities Company charging a violation of the Sherman Act through control by it of the stock of the Northern Pacific and the Great Northern railroad companies. The case went to final decree, which permitted the Securities Company to retain the stock but provided that such retained stock should have no voting rights. Thereupon the directors of the Securities Company formulated a plan for the distribution to its stockholders of shares of both the Northern Pacific and Great Northern. An application for leave to intervene was made by the trustees for the Oregon Short Line Railroad Company, one of the stockholders of the Securities Company, on the ground that the plan would vest a majority of the stock of the Great Northern and the Northern Pacific in the same individuals who cooperated in forming the Securities Company, thereby continuing the common management of the two competing railway companies and rendering the decree ineffectual. The petitioners asked to intervene and obtain further orders to prevent such result. The Court refused the intervention, saying at page 812:

"The United States is the complainant in this case. It is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiae,* so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise. The petitioners can intervene only for the protection of their own individual interests, and for that purpose only in the event that they can obtain adequate protection in no other way.

"The United States, speaking by its attorney general, says that it 'neither admits nor denies the allegations of the petition, but objects to the proposed intervention."

In *Buckeye Coal & Ry. Co.* v. *Hocking Valley Ry. Co.,* 269 U. S. 42 (1925), the United States had brought suit against the Hocking Valley Railway Company, other railway companies and certain coal companies, including the Buckeye Coal Company, to dissolve an illegal combination under the Anti-Trust Act. After a hearing a decree was entered ordering the railway companies to part with their interest in the coal companies. The coal lands of the Buckeye Coal Company had been pledged under a mortgage of the Hocking Valley Railway Company and the Coal Company had agreed to pay a certain royalty per ton of coal mined to retire the bonds. Pursuant to the decree, the Hocking Valley Railway Company sold the stocks of the Coal Company to a purchaser under an arrangement which provided that the coal lands were still subject to the mortgage and the Coal Company was still obligated to pay the

royalty. This sale was approved by the Court. Subsequently the Coal Company asked leave, which was granted, to file an intervening petition asking to have the Coal Company released from its obligations under the Railway Company mortgage on the ground that the maintenance of the lien on the coal lands might render the decree ineffective. Thereafter the United States also filed a petition similarly asking that the lien on the coal lands be dissolved and the obligation to pay the royalties be terminated. The District Court denied the application of both the Coal Company and the United States. The Coal Company appealed to this Court but the United States did not. This Court, in disallowing the appeal of the Coal Company, said, at pages 47-9:

> "There is an embarrassment of reasons why the appeal of the two coal companies should fail. * * *
>
> "Third, even if we assume that the United States might apply under the reservation clause to the District Court to direct the cancellation of the mortgage lien on the coal lands and the covenant as to the royalty, on a showing that they were being used to continue the illegal combination condemned in the main decree, it could only be done in the interest of the public represented by the United States. The petition of the United States on this head was denied by the court below, and the United States has taken no appeal.* * *
>
> "* * * The United States, which must alone speak for the public interest, does not appear with them on this appeal. They have therefore no *locus standi*. *United States* v. *Northern Securities Co.*, 128 Fed. 808."

These two cases, the *Northern Securities* case and the *Buckeye Coal-Hocking Valley* case, are squarely in point in

the instant case as authorities requiring the dismissal of the petition for intervention.

A similar conclusion may be deduced from the words of this Court in another Government equity anti-trust proceeding brought to dissolve the tobacco monopoly, where an application to intervene by the sellers of leaf tobacco had been denied by the District Court: *Ex parte Leaf Tobacco Board of Trade,* 222 U. S. 578 (1911); and where their petition to this Court to review the decision of the District Court approving a plan of dissolution was denied, this Court assigning as one of the reasons for its decision that the Government did not join in their petition (page 581):

> "The merely general nature and character of the interest which the movers allege they have in the papers here filed is not in any event of such a character as to authorize them in this proceeding to assail the action of the court below. This is more obvious in this case since the act of the court which is assailed has been accepted by those who are parties to the record."

The rule is similarly stated in Moore's "Federal Practice under the new Federal Rules" (1938), Vol. 2, page 2337, as follows:

> "Representation by the governmental authorities is considered adequate in the absence of gross negligence or bad faith on their part. A taxpayer could not intervene in a bondholders' action brought to have the money paid by the bondholders impounded pending a decision of the state supreme court on the legality of the bond issue. [*Farmers State Bank of New Washington, Ohio* v. *Board of Com-*

missioners of Jensen Bridge District, 295 Fed. 755 (S. D. Fla. 1920).] A subscriber of a telephone company had no absolute right to intervene in a suit by the utility against the city to enjoin the enforcement of rates alleged to be confiscatory, even though the subscriber expressed the apprehension that the city 'may or will relax its attention and energy to the detriment of petitioner and the other subscribers of the company.' [*In re Englehard & Sons,* 231 U. S. 646 (1914)]. Similarly, when a telephone company sued the Public Service Commission to enjoin the enforcement of alleged confiscatory rates, the City of New York had no absolute right to intervene, as the commission adequately represented the city. [*City of New York* v. *New York Telephone Company,* 261 U. S. 312 (1923)] * * *."

From the foregoing authorities it is clear that the District Court did not err in not permitting appellant as a private party to intrude into litigation conducted by the Government for the welfare of the people as a whole under the anti-trust laws.

If there were any doubt on the matter in the instant case, it would be laid to rest by the fact that appellant was permitted (R. 372) to be heard as "*amicus curiae* on questions of law and fact in regard to the fairness and effectiveness" of the proposed Plan filed by the defendant Companies providing for the modifications of the Consent Decree. Surely appellant, as a member of the general public, could not ask for anything more than a day in court and a chance to urge through its attorneys any considerations of fact or law bearing on the fairness of the proposed Plan and the proposed modifications of the Consent Decree. If appellant is not satisfied with this, it must

be because it is desirous of obtaining some private relief for itself and protecting some interest of its own quite apart from itself as a member of the general public. This the authorities do not permit.

C. Intervention will not be permitted where intervener seeks to introduce into an action entirely new issues. Specifically, it is well settled that issues of alleged unjust enrichment or private damages may not be introduced into an anti-trust suit brought by the United States Government.

The sole issue at the institution of this suit between the Government and the defendants was whether the defendants had violated the Anti-trust laws. The defendants denied that they had done so. To obviate the necessity and expense of a protracted litigation, the defendants agreed that they would do or refrain from doing certain things in the future. These things were embraced in the Consent Decree (R. 142) and accompanying Stipulation (R. 138). Subsequently, in January, 1939, the Government brought a Supplemental Complaint (R. 274), asking that either Columbia Gas be ordered to dispose of its stock having present or potential voting rights in Columbia Oil or that Columbia Oil be ordered to dispose of its stock of Panhandle Eastern. This was the only issue before the District Court at the time appellant brought its first intervention petition in February, 1939, and it is still strictly the only issue before the Court, so far as the pleadings are concerned, the defendants having filed their answers denying the allegations of this Supplemental Complaint. In the meantime, between the first intervention petition and the present or third intervention petition, the Government on May 15, 1939, moved for leave to withdraw the January,

1939, Supplemental Complaint (R. 332) and to file a proposed Amended Supplemental Complaint (R. 333) asking, in effect, to vacate the Consent Decree and to try the original anti-trust suit as if there had never been any decree, preserving meanwhile the status set by the Consent Decree. No action has been taken by the District Court upon this later motion of the Government and the filing of this second Supplemental Complaint has not yet been permitted by the Court. On June 20, 1939, defendants Columbia Gas and Columbia Oil filed a motion and voluntary Plan (not directed as a responsive pleading to any previous supplemental complaint) proposing that Columbia Gas give up all of its voting stock in Columbia Oil in return for certain oil and gasoline properties now owned by Columbia Oil, and proposing certain other incidental action (R. 384). This motion and Plan was referred by the Court to a Special Master, who reported in favor of it as a Plan appropriate to carry out the purposes of the Consent Decree (R. 373-396). The Government filed no objections to the Master's Report except as to his failure to require the stock owned by certain individuals in Columbia Oil to be sold; so far as the action to be taken by the corporate defendants is concerned the Government filed no objection (R. 403). On January 18 of this year the District Court handed down its decision (printed as Appendix A to this brief) approving the Plan and the Master's Report with the modifications so requested by the Government.

The foregoing are all the issues which have been raised in this proceeding.

The petition to intervene would inject new issues into the proceeding, to wit (R. 539): (1) whether Columbia Gas should account to Panhandle Eastern for dividends and

profits received from Michigan Gas Transmission Corporation and transfer to Panhandle Eastern as its permanent property the stock of the Michigan Company; (2) whether 80,000 shares of Panhandle Eastern Common Stock owned by Columbia Oil should be surrendered in return for a non-voting security; and (3) whether the Class A and B Preferred Stock of Panhandle Eastern owned by Columbia Oil should be made non-voting.. The determination of these issues, involving, as they do, issues of unjust enrichment and private property rights, would obviously complicate the issues before the Court and delay the determination of the Government's suit and the consummation of the Plan recommended by the Special Master.

This is brought out more clearly by a brief review of the allegations in the petition upon which the prayers for relief just referred to are based. Paragraph XIII of the petition alleges that Columbia Gas has received from Michigan Gas Transmission Corporation and is receiving therefrom "excessive profits" (R. 531) for which the prayer of the petition asks Columbia Gas to account to Panhandle Eastern (R. 539). Paragraph XIV alleges that allocation is made of prices received from the City of Detroit, under a contract between Michigan Gas Transmission Corporation and Panhandle Eastern, "so that an unfair and unreasonable part [of said prices] * * * is paid to and retained by Michigan Gas * * *." (R. 532); and paragraph XXI alleges that under a certain contract dated March 17, 1936, between Panhandle Eastern and Michigan Gas Transmission Corporation, Columbia Gas has exacted from Panhandle Eastern "an unreasonable and unfair price" for gas distributed along the Michigan Gas Transmission line in Indiana, Ohio and Michigan (R. 537); for both of which alleged unjust

profits made by Michigan Gas an accounting in favor of Panhandle Eastern is also asked in the prayer of the petition (R. 539). Though appellant has interwoven in its intervention petition certain allegations to the effect that the foregoing gives Columbia Gas a monopoly of natural gas in Indiana, Ohio and Michigan, the gravamen of the petition is the alleged unjust enrichment of Columbia Gas and Michigan Gas, at the expense of Panhandle Eastern. The relief asked by the petition is, in essence, a transfer of the ownership of private property and a money accounting in favor of Panhandle Eastern against Columbia Gas.

The case of *United States* v. *Radio Corporation of* America, 3 F. Supp. 23 (D. C. Del., 1933), is here squarely in point in showing that intervention by a private party will not be allowed in a government anti-trust suit, for the purpose of prosecuting private claims of a pecuniary nature. An anti-trust suit had been brought by the United States against Radio Corporation, General Electric, Westinghouse and certain other defendants which culminated in the entry of a consent decree. The decree provided that General Electric and Westinghouse should each divest itself of one-half of its shares of Radio Corporation by distributing such shares ratably to its own common stockholders. A stockholder of Radio Corporation petitioned to intervene, alleging that the original consideration given by General Electric and Westinghouse to Radio Corporation in return for the acquisition of its shares by them had been inadequate, and asked that the consent decree be modified so as to permit inquiry to be made regarding the adequacy and fairness of such consideration. The court denied the petition to intervene. The language of the court is so

apposite that it could be applied to the instant case with merely a change of name. The court said at page 25:

> "On what theory can leave to intervene be sustained? Petitioner apparently challenges all the transactions that took place between Radio, General Electric, and Westinghouse, commencing with the agreement of January 1, 1930, under which certain property and exclusive patent rights passed from General Electric and Westinghouse to Radio, and for which Radio issued to General Electric and Westinghouse shares of its stock. The basis of this attack seems to be the question whether Radio received fair and adequate consideration from General Electric and Westinghouse for such shares of stock of Radio, and whether dominance and control was exercised by General Electric and Westinghouse over Radio in this transaction. These inquiries have no relation to the relief sought in the government suit. As stated in Equity Rule 37 (28 U. S. C. A. § 723), intervention shall be 'in subordination to, and in recognition of, the propriety of the main proceeding.' To allow the intervention here sought and embark upon a determination of the questions raised by petitioner would be to import into this case new issues. This cannot be done. *United States* v. *Northern Securities Co.* (C. C.) 128 F. 808. The United States and the public can have no interest in any controversy of Radio Corporation, its stockholders and creditors, against the General Electric and Westinghouse companies. The consent decree terminated what promised to be protracted and burdensome litigation. It was entered in the public interest and met the policy of the statutes. * * *"

The same question was before the court in the *Northern Securities Company* case (128 Fed. 808; p. 40, *supra*),

where, in addition to asking for intervention on the ground that the proposed distribution of the stock of the two railroads by the Securities Company would not carry out the intent of the anti-trust laws, the petitioners also alleged the right to have particular shares of one of the railroads returned to them by the Securities Company and asked to be allowed to intervene in order to establish this private right. But the court held that this private controversy between the stockholders and the Securities Company constituted an issue outside the scope of the original suit, and denied intervention on this ground also, saying (at p. 813):

> "Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action, and if it so happens that the decree of this court in favor of the government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that company in the two railway companies ought to be distributed, or what should be done with such holdings, these are questions which can be settled among the stockholders themselves, who are more immediately concerned in these questions, and according to these principles of law and equity which any court having general common law and equity powers is competent to enforce."

The analogy between the *Radio* case, the *Northern Securities Company* case and the instant case is evident. In the instant case the Government as protector of the public interest sought a decree which would prevent violation of the anti-trust laws. The Government was and is in no way concerned with disputes as to the correct division of money

profits between the defendant Companies and Panhandle Eastern as long as Panhandle Eastern was and is in a position of free and independent action. The Government and the courts must be free to protect the interests of the Government and of the general public under the anti-trust laws unhampered by whether or not such protection benefits particular private interests.

In its opinion upon the first petition to intervene filed March 29, 1939 (R. 318), the District Court expressly found that the new issues attempted to be injected would depart from the scope of the Government's complaint and involve a serious delay in a determination of the questions raised thereby, saying that "petitioner has no right to encumber the main action which is being conducted by the Attorney General with extraneous issues of a private nature". This is still the case under the instant petition. Indeed the recent approval by the District Court of the proposed Plan of segregation (Appendix A to this brief) makes this even clearer. The trial of these "extraneous issues of a private nature" would impede the putting into effect of this Plan which has been approved by the Government, by the other parties to the cause, by the Special Master and by the District Court as a means to satisfactorily terminating this long and trying litigation.

D. It is a settled rule of practice that intervention will not be permitted after entry of the decree, for the purpose of attacking or modifying the same.

By the statement in its intervention petition that the petition is filed

> "in behalf of [Panhandle Eastern] * * * for relief to which the latter company is entitled under Sections IV and V of the [Consent] Decree * * *"

appellant is no doubt attempting to escape the well-settled rule that intervention will not be permitted for the purpose of attacking or modifying a decree already entered. However, the specific requests for relief (R. 539) conclusively show that appellant is attempting to attack and modify the Consent Decree.

For example, the petition requests in subdivision (a) of the prayers for relief that a trustee be appointed to hold all the stock of Michigan Gas Transmission Corporation for the benefit of Panhandle Eastern, subject only to repayment to Columbia Gas of its actual investment less dividends and profits received in the past. This is clearly contrary to the Consent Decree, which provided in Section IV (R. 148) that the necessary new line to connect the Panhandle Eastern's terminus with Detroit might be financed and built by Columbia Gas. The subsequent provision of Section IV, on which the brief of appellant in this Court mainly relies, that in the event that Columbia Gas shall, with respect to any contract or contractual rights or property used in connection with any contract, in any way interfere with the free transportation, sale and distribution of gas by Panhandle Eastern, Panhandle Eastern shall have the right to the appointment of a trustee to hold such contract rights or property "subject to the purposes and provisions of this Decree", is a provision designed to prevent the use of the property in violation of the anti-trust laws and in violation of the freedom of Panhandle Eastern to operate it independently. It is not a requirement that the property of the Detroit extension shall be turned over to Panhandle Eastern as a matter of private property right and Columbia Gas deprived of all income therefrom. Such beneficial ownership of the Detroit extension by Columbia

Gas is permitted by the portion of the Decree first above referred to, and was approved by Gano Dunn, as Trustee under the Decree (R. 161). Yet the relief asked in this clause (a) would be entirely inconsistent therewith.

Again, the third and fourth subdivisions of the prayers for relief of the petition demand that 80,000 shares of Panhandle Eastern common stock and the two classes of Panhandle Eastern preferred stock, now owned by Columbia Oil, be delivered up in exchange for non-voting securities. This is clearly contrary to Section II of the Decree (R. 145) wherein it is specifically provided that Columbia Oil may

> "own or acquire stock or obligations in Panhandle Eastern and exercise voting rights appurtenant thereto * * * subject to the further terms and provisions of this Decree [i.e., the trusteeship provided for in section III of the Decree]."

There could be no clearer case of attack upon an already entered decree than this. It is not "relief to which [Panhandle Eastern] is entitled under sections IV and V of the [Consent] Decree", but a direct attempt to have the Decree modified.

It seems hardly necessary to cite authority for the proposition that intervention will not be permitted after entry of a decree, for the purpose of vacating or modifying or otherwise impeaching the same; but for a recent statement by this Court we may cite *United States* v. *California Cooperative Canneries,* 279 U. S. 553 (1929), where the Court said (p. 556):

> "* * * It [the Court of Appeals] did not refer to the decisions which hold that an order denying

> leave to intervene is not appealable [citing cases], except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit [citing cases]. Nor did it refer to the settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree already made."

in support of which last-quoted sentence the Court (Justice Brandeis delivering the opinion) cited the following authorities in a footnote:

> "See *Forbes* v. *Railroad,* Fed. Cas. No. 4,926; *Coffin* v. *Chattanooga Water & Power Co.,* 44 Fed. 533; *Lombard Investment Co.* v. *Seaboard Mfg. Co.,* 74 Fed. 325, 327; *Land Title & Trust Co.* v. *Asphalt Co. of America,* 114 Fed. 484; *State Trust Co.* v. *Kansas City, etc. Co.,* 120 Fed. 398, 407-408. This rule of practice is embodied in Equity Rule 37. See *Hutchinson* v. *Philadelphia & G. S. S. Co.,* 216 Fed. 795; *Hopkins* v. *Lancaster,* 254 Fed. 190; *Cauffiel* v. *Lawrence,* 256 Fed. 714; *King* v. *Barr,* 262 Fed. 56; *Mueller* v. *Adler,* 292 Fed. 138; *In re Veach,* 4 F. (2d) 334; *Union Trust Co.* v. *Jones,* 16 F. (2d) 236; *Board of Drainage Com'rs* v. *Lafayette Bank,* 27 F. (2d) 286. Compare *Farmers' Loan & Trust Co.* v. *Kansas City R. R.,* 53 Fed. 182, 186; *United States* v. *Northern Securities Co.,* 128 Fed. 808; *Horn* v. *Pere Marquette R. R.,* 151 Fed. 626, 634; *United States* v. *McGee,* 171 Fed. 209; *Jennings* v. *Smith,* 242 Fed. 561, 564; *Adler* v. *Seaman,* 266 Fed. 828."

Appellant has heretofore argued that this is no longer the law, because the former requirement of Equity Rule 37 that "the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding"

has not been carried into the new Rules of Civil Procedure. But this was settled law long before the adoption of former Equity Rule 37, as appears from the citations contained in Justice Brandeis's note just quoted, and there is nothing in the new Rules which states that this "settled rule of practice" is no longer in force. Omission of the new Rules to affirmatively reiterate it cannot be considered as the equivalent of a repeal of such a settled and important rule.

POINT IV

THE APPELLANT'S APPLICATION WAS PROPERLY DENIED FOR THE FURTHER REASON THAT THE ORDER DENYING ITS FIRST PETITION TO INTERVENE WAS CONCLUSIVE AGAINST PERMITTING INTERVENTION ON THE INSTANT PETITION; INASMUCH AS THIS ALLEGES NO NEW FACTS OF SUBSTANCE.

The present application by appellant alleges nothing new of substance which was not comprised in its first application filed February 6, 1939.

From a comparison of the allegations of the two applications it appears:

I. that both in the first application (R. 308; par. XXXIII) and in the present application (R. 526) appellant sought to intervene on behalf of Panhandle Eastern;

II. that both the first application (R. 307, par. XXIX and R. 308, par. XXXIII) and the present application (R. 526, 539) support the claim to intervene by invoking the alleged rights of Panhandle Eastern under Sections IV and V of the Consent Decree;

III. that the acts complained of in the two applications are identical, namely (1) the acquisition by Columbia Gas of the right to construct the Detroit extension (R. 292-293, pars. XIII-XV in first application, and R. 529-531, pars. XI-XIII in present application); (2) the construction, ownership and operation by Columbia Gas of the Detroit extension (R. 293-294, pars. XV-XVII in first application, and R. 531, 532, pars. XIII-XIV in present application); (3) the acquisition by Columbia Oil of 80,000 shares of Panhandle Eastern Common Stock (R. 295, par. XVIII in first application, and R. 532, par. XV in present application); (4) the acquisition by Columbia Oil of the Panhandle Eastern A and B Preferred Stock (R. 300, par. XX in first application, and R. 534-535, par. XVIII in present application); and (5) the making of the March 17, 1936, contract between Panhandle Eastern and Michigan Gas Transmission Corporation providing for the operation of the Detroit extension (R. 301-304, pars. XXI and XXII in first application, and R. 535-538, pars. XX and XXI in present application); and

IV. that the relief asked in both applications is the same or, where different, the later application asks for the lesser relief, to wit: (1) that the Michigan Gas Transmission Corporation be placed in trust for Panhandle Eastern, Columbia Gas to receive only its actual investment less dividends and profits already received (R. 310, pars. *a* and *b* in first application, and R. 539, par. 2 in present application); (2) that 80,000 shares of Panhandle Eastern Common Stock be surrendered to Panhandle Eastern in return for cancelation at cost (R. 310, par. *c* in first application; the present application asks only that the shares be surrendered for a non-voting stock; R. 539, par. 3); and

(3) that the B Preferred Stock of Panhandle Eastern owned by Columbia Oil be canceled at cost and the remainder of Columbia Oil's Panhandle holdings, to wit, the A Preferred and the remainder of its Common Stock, be ordered sold (R. 310, pars. *c* and *d* in first application; the present application asks only that both classes of preferred stock be made non-voting; R. 539, par. 4). In addition, the first application asked that Gano Dunn be removed as Trustee and a new trustee appointed pending divestiture by Columbia Oil of its Panhandle Eastern securities (R. 310, par 3); and the first application also asked that the appellees be adjudged guilty of contempt for failure to comply with the Consent Decree (R. 310, par. 1).

In short, the present application contains no new matter that was not present or included in Mokan's earlier application for leave to intervene.

Furthermore, the objections raised by the Disfrict Court in its opinion denying the first application of February 6, 1939 (R. 314) are applicable to the present application. In fact this seems to be conceded by the appellant, since in its Statement As to Jurisdiction (p. 3 thereof), referring to the opinion of the District Court denying the first application, it states that "petitioner believes it states the grounds upon which the Court acted in denying the instant application".

As shown in Point II (*supra*), the order from which the present appeal is taken is not appealable, because Mokan is not entitled to intervene as of right. But if such order were appealable, then so was the previous order (R. 321) denying Mokan's first application to intervene, and under such circumstances the earlier order, in the absence of any substantial new allegations of facts, is a complete bar to a

second application. This very point was squarely decided in connection with successive intervention applications in *United States Trust Co.* v. *Chicago Terminal T. R. Co.*, 188 Fed. 292 (C. C. A. 7th, 1911), a case involving a receivership of a company, wherein a committee of stockholders filed a petition (their second) for leave to intervene, which the court denied on April 17, 1909; no appeal was taken, but subsequently the stockholders moved for leave to file a third intervening petition; this was also denied on January 5, 1910 and the stockholders appealed from this later order. The appeal was dismissed by the Circuit Court of Appeals on the ground that the denial of the second petition was conclusive against granting the third petition inasmuch as the later petition alleged no new cause of action not comprised in the previous petition. The Court said at pages 299-300:

> "If the order of January 5, 1910, denying leave to intervene, is appealable, it is so because it is a final order or decree against appellants. If so, the order of April 17, 1909, denying leave to intervene, was equally a final order or decree. * * * Suppose a suitor should file an original bill, and the court should decline to hear him and should enter a final decree dismissing the bill for lack of merit on its face. Could such a suitor require the court to hear the same cause of action on a second bill which disclosed the former proceedings and adjudication? We are of opinion that the answer applies to the present case. No inadvertence or mistake, as ground for amendment of the second petition, was advanced. If there had been ground for amendment, the amendment should have been made before the final order was entered. If the ground was not known until afterwards, an application to vacate the final

> order or a petition for review should have been made in the Circuit Court. Without getting rid of that final order by proceedings either in the Circuit Court or on appeal, the stockholders could not thereafter compel a hearing of the same complaint. If that is not so, then appellants might also have ignored the final order of January 5, 1910, and have renewed their application as many times as they pleased."

The language is entirely applicable to the instant case. Mokan could not present its application, from the dismissal of which this appeal is taken, without getting rid of the order denying its first application, either by proper appeal or otherwise. The fact that in the present case Mokan appealed the order denying its first application to the wrong court, ignoring the Expediting Act, does not alter the rule; in the case from the Circuit Court of Appeals just cited, no appeal at all was taken from the first order. The situation is precisely as if Mokan had brought an original bill, which was then dismissed for want of equity, and Mokan were now to seek to bring another bill again on the same facts.

The same result has been reached by two other courts, each denying a second petition of intervention filed for the purpose of asserting the same claim as a first petition of intervention which had been dismissed on the merits, the Court stating that the dismissal of the first petition of intervention constituted a bar to the second: *Manhattan Trust Co.* v. *Trust Co. of North America*, 107 Fed. 328 (C. C. A. 8th, 1901) (cert. den. 181 U. S. 622); *McDonald* v. *Seligman*, 81 Fed. 753 at 759 (C. C. N. D. Cal. 1897).

The fact that the District Court in denying the first application did not in its opinion advert to the claim made by Mokan in behalf of Panhandle Eastern based on Sec-

tions IV and V of the Consent Decree, but placed its opinion on other grounds, does not make the earlier order any the less a bar to this proceeding, for the first application asserted as one of its grounds the alleged right of Panhandle Eastern under Sections IV and V of the Consent Decree (R. 307, par. XXIX, and R. 308, par. XXXIII). It has been conclusively decided by this Court that an issue so asserted in one proceeding operates as a bar to a raising of the same issue between the same parties in a subsequent proceeding even though the opinion of the court dismissing the earlier proceeding did not advert to this issue: *Grubb* v. *Public Utilities Commission of Ohio,* 281 U. S. 470 at 477 (1930). And the decision of *Manhattan Trust Company* v. *Trust Co. of North America,* 107 Fed. 328 (C. C. A. 8th, 1901) (cert. den. 181 U. S. 622), just cited, held the same in a case where the second petition of intervention attempted to justify itself on the ground that, though the pleadings of the first petition of intervention had raised the issue relied on in the second petition, this issue had not been considered in the opinion dismissing the first petition; the court saying (p. 332):

> "Any other rule would make litigation interminable. As long as a party could show that the court, in its opinion, took no notice of one of its alleged grounds for relief, he could file a new bill seeking the same relief sought by his first bill on that ground, and so on as long as any one of the grounds of relief set up in his first bill was not discussed, and in terms decided against him, in the opinion of the court."

These words are exactly applicable to the petition of intervention in the instant case here on appeal.

The application of these principles to the present appeal works no hardship upon appellant. Had appellant been interested in adjudication rather than delay, it would have taken its appeal from the order of March 30, 1939 (R. 321), denying its first intervention application, direct to this Court under the Expediting Act (15 U. S. C. §§ 28, 29), and such appeal under that Act had to be taken within sixty days. Instead appellant filed no notice of appeal whatsoever until June 26, 1939 (R. 6), when it filed its notice with the Circuit Court of Appeals, nearly three months after the entry of the order sought to be appealed. The time for appeal under the Expediting Act to this Court had already expired before any move to appeal was made. In these circumstances appellant cannot claim that it is being deprived of an appeal. The doctrine of *res judicata* was intended to prevent just such interminable litigation as is here being attempted.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED, OR, IF THE COURT CONSIDERS THE APPEAL, THE ORDER OF THE DISTRICT COURT APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

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APPENDIX A

IN THE

District Court of the United States

FOR THE DISTRICT OF DELAWARE.

UNITED STATES OF AMERICA, *Plaintiff,* v. COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, GEORGE H. HOWARD, PHILIP G. GOSSLER, CHARLES A. MUNROE, THOMAS R. WEYMOUTH, THOMAS B. GREGORY, EDWARD REYNOLDS, JR., BURT R. BAY and JOHN H. HILLMAN, JR., *Defendants.*	No. 1099 In Equity.

Hearing on report of special master recommending approval of a plan of divestiture filed by the defendant corporations and on separate exceptions to the report filed by the United States, by the City of Detroit, and by Missouri-Kansas Pipe Line Company (herein referred to as "Mokan"); and further, for a modification of the consent decree entered in this cause January 29, 1936.

October 30, 1935 the United States filed its amended and supplemental petition, superseding its original petition, charging Columbia Gas & Electric Corporation (herein

referred to as "Columbia Gas"), Columbia Oil & Gasoline Corporation (herein referred to as "Columbia Oil"), and certain individuals with dominating and controlling the management and operation of Panhandle Eastern Pipe Line Company (herein referred to as "Panhandle Eastern") with the purpose and effect of preventing competition, actual and potential, between Panhandle Eastern and Columbia Gas and of monopolizing and attempting to monopolize interstate trade and commerce in natural gas in certain sections of the United States, in violation of the anti-trust laws.

The several defendants filed answers to the petition specifically denying the charges therein.

Columbia Gas is a holding company owning the stock of more than fifty operating public utility subsidiaries engaged in the production, transmission and distribution of natural gas. Their field of operations extended from Muncie, Indiana, through the States of Ohio, Kentucky, West Virginia and Pennsylvania, and to other points on the eastern seaboard. Together, they constituted the "Columbia System". Their operations were concentrated in the State of Ohio where the petition alleges they enjoyed a virtual monopoly in natural, mixed and artificial gas. In 1930 Columbia Oil was organized by Columbia Gas to hold the oil and gasoline producing properties of the Columbia System segregated from its public service properties. In 1928 Mokan was organized for the purpose of producing and distributing natural gas in the States of Kansas and Ohio and intervening states. By 1930 Mokan had acquired substantial gas producing acreage in the Panhandle district of Texas and in Kansas. In December, 1929 Mokan organized Panhandle Eastern for the purpose of building and operating a natural gas pipe line from the sources of supply in Texas and Kansas to Indianapolis, with possible extensions to points in Michigan and Ohio.

CONSENT DECREE

January 29, 1936, pursuant to a stipulation entered into between the Government and the defendants, a consent decree was entered by this court in this cause. The general object of the consent decree was to prevent Columbia Gas from exercising dominion or control, direct or indirect, over the affairs of Panhandle Eastern. To this end elaborate injunctive provisions were inserted in the decree. The decree provided, among other things, that voting stock of Panhandle Eastern then held or afterwards acquired by Columbia Oil was to be placed in the custody of a trustee named in the decree, who was to vote the stock for the election of the number of directors of Panhandle Eastern which the stock was entitled to elect (six out of a total of nine), such directors to include the trustee and the remainder to be selected by him from among persons recommended by Columbia Oil "in conference and with the advice of the trustee", but excluding any past or present officer, director, agent, or employee of Columbia Gas; and the trustee was empowered "to remove and replace such directors with others of his own choosing upon his own motion, if in his judgment such action is necessary in the interest of Panhandle Eastern or for the effectuation of the purposes of this decree". The decree named Gano Dunn as such trustee.

The decree enjoined the defendants from exercising dominion or control over Panhandle Eastern or interfering with its independence of action in the sale of gas, and from owning securities of Panhandle Eastern, subject, however, to the following: The defendants were permitted to own stock of Columbia Gas and Columbia Oil and to be directors and officers thereof; Columbia Gas was permitted to own obligations (without voting rights) of Panhandle Eastern; and Columbia Oil was permitted to own or acquire voting stock or obligations of Panhandle Eastern subject to the trusteeship created by the decree.

The decree further contained provisions applicable to financing the proposed extension of the Panhandle Eastern pipe line to the City of Detroit, Michigan.

The decree further provided for a termination, with the approval of the Court, of the trust created thereunder, when:

(1.) Columbia Gas has divested itself of all control, direct or indirect, of Panhandle Eastern by—.

(a) No longer owning voting stock of Columbia Oil, or

(b) By Columbia Oil divesting itself of ownership of all stock of Panhandle Eastern, or

(2) "Under the circumstances then existing, the continuation of said trust is no longer essential or necessary in carrying out the purposes of this decree."

In addition, the decree provided for a termination of its injunctive provisions, with the approval of the Court, when Columbia Gas no longer owned voting stock of Columbia Oil.

The consent decree was entered pursuant to a stipulation between the parties as above recited. That stipulation required performance by Columbia Gas and Columbia Oil of five or more essential requirements. It is unnecessary to discuss these requirements or to recite the steps taken under the consent decree and stipulation. The working arrangement provided by the consent decree has been carried out from the entry thereof. After the entry of the consent decree the stock of Panhandle Eastern owned by Columbia Oil was promptly lodged with Gano Dunn as Trustee and has continued to be held and voted by him. The Trustee has performed his duties as required by the consent decree.

SUPPLEMENTAL COMPLAINT

January 12, 1939 the United States filed a supplemental complaint in this causing stating, among other things:

"The course of events since the entry of said decree on January 29, 1936, has made it increasingly clear (1) that the only effective way to restore and maintain a position of free and independent action for Panhandle Eastern is to require Columbia Gas to divest itself of all stock of any class having existing or potential voting rights in Columbia Oil, or to require Columbia Oil to divest itself of ownership of all stock of Panhandle Eastern, as contemplated by the last paragraph of section III of said decree, and (2) that to accomplish the purpose of said decree, it is necessary to supplement said decree by a further order requiring the formulation and submission to this Court for approval of a suitable plan or plans to accomplish such divestiture."

After referring to the restrictions found in Section II and the trust established with Gano Dunn in Section III of the consent decree, the supplemental complaint concludes by asking for relief in the alternative through an order of the Court as follows:

"Directing Columbia Gas to divest itself of all control, direct or indirect, legal or practical, of Panhandle Eastern, either by disposing of all interests which it may have in any stock of any class having present or potential voting rights in Columbia Oil, or by causing Columbia Oil to divest itself of ownership of all stock of Panhandle Eastern; and, to that end:

(a) Directing Columbia Oil to proceed straightway to formulate and submit to this Court for approval, through the trustee for sale constituted in accordance with subsection 5 of this section III, a plan for the sale or other disposition by it of all interest which it may have in any stock of Panhandle Eastern;

(b) Directing Columbia Gas to proceed straightway to formulate and submit to this Court for approval, as an alternative to any plan submitted by Columbia Oil pursuant to paragraph (a) of this subsection 4, a plan for the sale or other disposition by it of all interest which it may have in any securities having present or potential voting rights in Columbia Oil."

Defendants Columbia Gas and Columbia Oil filed answers in opposition to the supplemental complaint.

May 15, 1939 the United States filed two motions: (1) For leave to abandon its supplemental complaint filed January 12, 1939, and (2) to vacate the consent decree entered January 29, 1936, and restore the original anti-trust action to the trial calendar upon an amended and supplemental complaint tendered with its motions. Action on these motions was not pressed.

June 20, 1939 defendants filed the voluntary plan of divestiture which is now before the Court, looking to a modification of the consent decree. This plan is substantially the first of the alternatives sought by the Government in its supplemental complaint of January 12, 1939.

July 10, 1939 the plan of divestiture was referred to a special master to "make report to this Court of his findings of fact, conclusions of law and recommendations concerning the said motion and said proposed plan". The order of reference provided that permission be granted to Mokan, then the holder of all of the stock of Panhandle Eastern not owned by Columbia Oil, and to the City of Detroit, Michigan, and to the City of Toledo, Ohio, to appear at the hearing as *amici curiae* but not as intervenors. Mokan and the City of Detroit appeared, cross-examined witnesses, and filed briefs.

July 29, 1939 the special master filed his report with the recommendation:

"The undersigned respectfully recommends, if your Honor should conclude that enlargement of the provisions of the plan dealing with retention of jurisdiction is unnecessary, then that your Honor approve the amended plan and upon approval of the Securities & Exchange Commission to the extent required by law and upon the taking of appropriate corporate action by the stockholders of Oil necessary under Section 6 of the Plan as amended, that the motion of Columbia Gas & Electric Corporation and Columbia Oil & Gasoline Corporation referred to in the order of reference dated July 10, 1939 be granted, that the consent decree herein dated January 29, 1936 be modified as provided in that motion and in accordance with the terms of the proposed plan."

The Court finds that the provisions of the plan respecting the retention of jurisdiction are adequate and an enlargement of those provisions is unnecessary. The plan by its terms is made subject to the approval of the Securities & Exchange Commission and to such corporate action by stockholders of Columbia Oil as may be necessary and appropriate.

PLAN OF DIVESTITURE

Columbia Oil was organized in 1930 as a subsidiary of Columbia Gas to hold oil and gasoline properties of the Columbia System. The business of Columbia Oil and of Columbia Gas was intimately associated. This relation contributed to close operating and personal ties between the two companies.

Columbia Oil has the following securities outstanding: 400,000 shares of participating preferred stock, owned entirely by Columbia Gas, and entitled to elect a minority of directors of Columbia Oil; $21,000,000 principal amount

of twenty-year debentures due in 1956, carrying 6% interest and owned entirely by Columbia Gas; 2,336,826 shares of common stock. The participating preferred stock and debentures were issued to Columbia Gas and their retention was permitted by the consent decree.

The plan provides:

(1) Columbia Gas will surrender to Columbia Oil the 400,000 shares of participating preferred stock of Columbia Oil, being all of the issue of that stock, in exchange for all oil and gasoline properties of Columbia Oil.

(2) Columbia Oil will pay $10,000,000 to Columbia Gas on its debenture indebtedness aggregating $21,000,000. The $10,000,000 is to be raised by Columbia Oil through persons having no connection with Columbia Gas.

(3) Columbia Gas will reduce from 6% to 3% the interest rate on the $11,000,000 of debentures remaining outstanding.

(4) In the event of default upon such remaining debentures, Columbia Gas will not be permitted to acquire ownership or control or be a purchaser in judgment sale of securities of Panhandle Eastern owned by Columbia Oil.

The result of these changes will be: (a) Columbia Gas will own no stock in Columbia Oil and accordingly will possess no voting rights therein; (b) Columbia Oil will hold as its only asset stock of Panhandle Eastern, and all operating relationship with Columbia Gas will terminate; (c) the indebtedness of Columbia Oil to Columbia Gas will be reduced almost one-half; (d) interest payments on the remaining indebtedness will be halved. Thus the influence of Columbia Gas over Columbia Oil will be minimized or removed.

(5) Columbia Gas will grant an option to Panhandle Eastern, for one year from the entry of a final decree approving the plan, to purchase at the actual investment of

Columbia Gas therein the so called Detroit Extension of the Panhandle Eastern pipe line connecting its Eastern terminus with the City of Detroit if Panhandle Eastern buys a gas pipe line of Ohio Fuel Gas Company in Indiana for $355,191. This Detroit Extension is owned by Michigan Gas Transmission Corporation and Indiana Gas Distribution Corporation, wholly owned subsidiaries of Columbia Gas. If, during the year, Columbia Gas receives from sources not connected with it a satisfactory offer to purchase such properties, Panhandle Eastern will have ninety days within which to meet such terms. However, if Panhandle Eastern fails to meet such offer, Columbia Gas shall be free to accept the earlier offer. If no such sale has been made within the one-year period, a trustee shall be appointed to make sale to any purchaser not connected with Columbia Gas for a price not less than the actual investment of Columbia Gas therein, unless Columbia Gas consents to a lesser price. Thus, Columbia Gas parts with the physical link connecting Panhandle Eastern with Detroit.

(6) The following securities of Panhandle Eastern were issued to Columbia Oil pursuant to plans of reorganization and settlement with the Receivers of Mokan: 100,000 shares (the entire issue) of Class A Preferred stock (not entitled to vote for directors); 10,000 shares (the entire issue) of Class B Preferred stock (entitled to elect two directors); and 404,326 shares of common stock of a total of 808,652 shares outstanding.

Columbia Oil has a board of seven directors. The voting rights of the stock it beneficially owns in Panhandle Eastern elects six of the nine directors of Panhandle Eastern. Those directors are elected by the trustee pursuant to the terms of the consent decree. The plan provides that the trusteeship created by the consent decree with respect to voting securities of Panhandle Eastern owned by Columbia Oil shall terminate. Thereupon, all officers

and directors of Columbia Oil and the six directors of Panhandle Eastern elected by the stock of Columbia Oil shall resign; and the directors of Columbia Oil shall own no stock or securities of Columbia Gas. The directors of Columbia Oil shall not include anyone who has ever been an officer, director or employee of Columbia Gas or of any of its subsidiaries. For a period of five years such directors shall not include any person "who shall be objectionable to the Department of Justice". Directors of Panhandle Eastern elected by Columbia Oil shall also be directors of Columbia Oil elected under the plan. Jurisdiction of this cause shall be retained by this Court "for the further purpose of requiring the resignation of any officer or director of Columbia Oil, or any successor thereto, whenever such step may be necessary to effectuate the purposes of the decree". Further, to effectuate said purposes Columbia Oil will take appropriate corporate action to "stagger" its board of directors into three classes elected for terms of one, two, and three years, respectively, with the maximum number permissible by law elected for the longest term.

The foregoing provisions of the plan will create a new slate of directors for Columbia Oil and a new slate of officers to be elected by such new directors. It will also provide a new slate of directors of Panhandle Eastern representing Columbia Oil. All directors elected by Columbia Oil, however, shall have no interest in Columbia Gas or have been an officer, director, or employee of Columbia Gas or any of its subsidiaries. Moreover, such directors must not be objectionable to the Department of Justice. The power continues to reside in this Court to require the resignation of any officer or director of Columbia Oil with the consequent disqualification to serve as a director of Panhandle Eastern representing Columbia Oil "whenever such step may be necessary to effectuate the purposes of the decree".

AMENDMENT OF CONSENT DECREE

To meet the changed conditions resulting from the carrying out of the plan of divestiture, the plan provides for the amendment of the consent decree in the following particulars:

(1) To terminate the Trusteeship of Gano Dunn.

(2) To substitute the following injunctions in lieu of the injunctive provisions contained in Sections II and IV of the consent decree:

(a) Injunctions prohibiting Columbia Gas and the individual defendants from acquiring, owning or voting any securities of Panhandle Eastern, and any securities of Michigan Gas Transmission Corporation if and when Columbia Gas shall have sold its investment therein as contemplated in the plan;

(b) Injunctions prohibiting Columbia Gas from acquiring, owning or voting any securities of Columbia Oil, except that it may continue to own the $11,000,000 of debentures of Columbia Oil and may acquire up to $2,000,000 of additional debentures under existing commitments; also from controlling Columbia Oil or Panhandle Eastern, or Michigan Gas Transmission Corporation if and when its investment therein is disposed of; and

(c) Injunctions prohibiting the individual defendants from acquiring, owning or voting securities of Columbia Oil in addition to those now owned by them, participating in the management of Columbia Oil or of Panhandle Eastern, or participating in the management of Michigan Gas Transmission Corporation if and when the investment of Columbia Gas therein is disposed of as contemplated by the plan.

The plan further provides that the consent decree shall be amended to provide for the sale within five years by Philip G. Gossler of all stock owned by him in Columbia Oil and an injunction against his voting such stock in the interval until it is disposed of.

The Government objects to approval of the plan unless certain blocks of common stock of Columbia Oil "be disposed of by the present holders thereof to other persons having no direct or indirect interest in or connection with Columbia Gas & Electric Corporation on or before the entry of any final order approving the amended plan". These blocks of common stock are:

Holders	*Shares*
The United Corporation and its subsidiary, New York United Corporation	84,769
Philip G. Gossler	65,872
Mrs. Katherine Clay	30,358
E. W. Edwards	25,009
Present officers and directors of Columbia Gas	8,697

Since the Master's report arrangements satisfactory to the Government have been made which eliminate the necessity for any provision relating to United's stock. The United Corporation has agreed to be made a party to this proceeding and that the decree herein prohibit it from voting the stock of Columbia Oil which it owns without the prior approval of this Court except that it may vote such stock for the purpose of a quorum and for the proposed plan.

Gossler was president of Columbia Gas from 1926 until the filing of the Government's petition in October, 1935. He was the chief executive officer of Columbia Gas during the entire period complained of in the petition. He remained president of that company until he assumed his present office of chairman of the board. He was one of the three voting trustees of common stock of Panhandle East-

ern from the time of the creation of such voting trust until September 19, 1935. In 1930 and 1931, when the conspiracy of which the Government complains in its petition had its origin, he was also a director of Panhandle Eastern and a director and president of Columbia Oil. The petition alleges that he was "a central figure, if not the prime mover, in the creation and execution of the conspiracy complained of". He is the largest individual holder of common stock of Columbia Oil, excluding The United Corporation. He is also a substantial holder of common stock of Columbia Gas.

The plan provides that Gossler shall "within five years after the entry of the order approving the Plan, sell all stock now owned by him in Columbia Oil, or any successor thereto, and, in the intervening period so long as he shall own any stock in Columbia Oil, or any successor thereto, shall be enjoined from voting any shares of such stock or suggesting how any shares of such stock owned by any of his relatives should be voted."

It is true that this proposal will neutralize the voting power of Gossler's stock. It does not, however, remove the substantial financial interest he may continue to have for at least five years from the entry of a final decree in Columbia Oil while at the same time remaining chairman of the board and a substantial stockholder of Columbia Gas. The record does not justify a finding that undue hardship would be suffered by Gossler in requiring him to dispose of his stock on or before the entry of a final decree approving the plan. If hardship were entailed, such result must be held an incident of this litigation and a contribution by one of the principal defendants to the accomplishment of the object sought in this proceeding. Final approval of the plan and amendment of the consent decree will be conditioned upon the prior disposal by Gossler to another person or persons having no direct or indirect interest in or connection with Columbia Gas of any and all common stock of Columbia Oil which he may own.

Similar considerations apply to the stock held by officers and directors of Columbia Gas. They should not be interested in voting securities of Columbia Oil.

A different situation, however, exists with respect to the stock of Edwards and of Mrs. Clay, daughter of Gossler. Neither of those persons is a defendant in this cause. The court has no jurisdiction or control over them. Edwards has not been a director of Columbia Gas since 1938. Possibly some agreement may be reached by the parties with respect to the treatment of these two blocks of stock before the time arrives for the entry of a final decree.

Mokan raises the same objections urged by the Government with respect to the stock of the individual stockholders above mentioned. It adds to that list Charles A. Munroe and William P. Philips, voting trustees of the dissolved voting trust of Columbia Oil, and four brokerage firms. Since the dissolution of the voting trust, the voting trustees have not voted stock held by them and have advised the court they will not vote such stock. There is no evidence of any connection between Columbia Gas and any of the four brokerage firms except that a member of one firm is a director of Columbia Gas and another member (now deceased) was formerly a director of Columbia Gas. The owners thereof have the right to direct how their shares shall be voted. The Court has no jurisdiction over them. No order will be made respecting this stock.

The plan of divestiture provides that for a period of five years from the date of the entry of an order approving the plan, the directors of Columbia Oil shall be persons "not objectionable to the Department of Justice". Mokan asserts that such an amendment is illegal under the Laws of Delaware because stockholders of a Delaware corporation may choose as their directors whomsoever they please. Mokan further asserts that the adoption of such an amendment would not bind the dissenting minority.

The charter of Columbia Oil may be amended by its stockholders to provide the qualifications of a candidate for director. Under Delaware law it would be possible by

charter amendment to impose as a qualification of eligibility for a period of five years the requirement that a candidate be not objectionable to the Department of Justice. An amendment to that effect would bind both the majority voting for it and any dissenting minority. Triplex Shoe Co. vs. Rice and Hutchins, 17 Del. Ch. 356. Maddock vs. Vorclone Corp., 17 Del. Ch. 39. Morris vs. American Pub. Utilities Co., 14 Del. Ch. 136.

Irrespective of Delaware law, this court in a Federal anti-trust case has the right to impose such a requirement as to the qualification of directors. Columbia Oil is before the Court as a party. For the purpose of enforcing the anti-trust laws an injunction binding Columbia Oil can also bind its stockholders.

The other objections raised by Mokan to the plan of divestiture have been fully considered by the Court and have been found untenable.

In addition, the City of Detroit objects to the approval of the plan and urges that the plan of divestiture should follow substantially the second of the alternatives sought by the Government in its supplemental pleading, i.e., by causing Columbia Oil to divest itself of ownership of all stock of Panhandle Eastern. The question before the Court, however, is not the relative merits of two plans of divestiture. The question is simply whether the plan before the Court is adequate to meet the requirements for relief under the anti-trust laws. The Government has taken the position that the plan submitted, with certain modifications which this Court has approved, will be effectual to accomplish the relief sought. The City of Detroit has harkened back to a plan of divestiture not developed at the hearings or considered by the special master and not before the Court.

An order in accordance with this opinion may be submitted.

(Sgd.) JOHN P. NIELDS
J

January 18, 1941.